In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-901

JOHN DOE, on behalf of himself and every other person similarly situated in the same or similar class, *Petitioner,*

vs.

RALPH LAMB, SHERIFF OF CLARK COUNTY, NEVADA, in his official capacity, STATE OF NEVADA, and COUNTY OF CLARK, *Respondents.*

Supreme Court, U. S.
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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF THE RESPONDENTS OPPOSING CERTIORARI

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RALPH LAMB, SHERIFF OF CLARK COUNTY, NEVADA, in his official capacity, STATE OF NEVADA, and COUNTY OF CLARK, *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF THE RESPONDENTS OPPOSING CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of the State of Nevada is reported at 92 Nev. Adv. Op. 163, 554 P.2d 732 (1976).

JURISDICTION

The jurisdiction of this Court is questioned under Article III, §2 of the Constitution of the United States of America.

QUESTIONS PRESENTED

1. Where the Supreme Court of the State of Nevada has reversed and remanded an action with direction to the trial court to dismiss on the grounds that said action was in the nature of an advisory opinion, and where the issuance of advisory opinions are in excess of the jurisdiction granted to the courts of the State of Nevada by the Constitution of the State of Nevada, does the United States Supreme Court have jurisdiction to entertain a review of said decision by certiorari?
2. Where the Supreme Court of the State of Nevada has decided an action on state jurisdictional grounds without reaching or reviewing the purported federal question presented by an application for certiorari, does the United States Supreme Court have jurisdiction to review said purported federal question?
3. Does the United States Supreme Court have jurisdiction to entertain a review of the federal question presented by this application?
4. Assuming that the United States Supreme Court has jurisdiction to entertain this application, is the cause presented of sufficient national application and import to warrant the Court's affirmative consideration of this application?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Nevada Constitution, Art. 6, §§4 and 6 (App. A2-A3).

United States Constitution, Art. III, §2 (App. A1).

Uniform Declaratory Judgment Act, Nevada Revised Statute 30.030 (P.B. 10).

Nevada Rule of Civil Procedure 10(a) (App. A3-A4).

Nevada Rule of Civil Procedure 23(a) (App. A4-A5).

STATEMENT OF CASE

On December 12, 1975, an action was brought against the Sheriff of Clark County by an unidentified plaintiff under the pseudonym John Doe. That action sought a declaratory judgment and injunction against the enforcement of the gaming statutes of the State of Nevada and ordinances of the County of Clark.

A Motion to Dismiss was filed on January 15, 1976, by the Sheriff contesting the jurisdiction of the District Court to proceed with this action. It was contended that John Doe failed to satisfy the requirements for declaratory relief since there was no justiciable controversy and in effect sought to secure an advisory opinion.

After filing this Motion to Dismiss the Sheriff noticed John Doe that he would take his oral deposition. Thereafter the County of Clark and the State of Nevada were made party defendants by order of the District Court and also moved to dismiss the complaint. Doe, invoking the Fifth Amendment privilege moved for a protective order to prevent the taking of his deposition. In addition he sought to amend the complaint to include a class of

similarly situated persons and to accelerate the trial on its merits. On April 23, 1976, the District Court denied the Respondents' motions to dismiss the complaint; granted Petitioner's motions and ordered all discovery to be completed by May 17, 1976. The amended complaint was filed on May 5, 1976 (Petitioner's Brief page 16 hereinafter referred to as P.B.).

Written interrogatories and requests to produce documents were directed to the Petitioner as an individual and as the only representative of the undefined and unnoticed class. These interrogatories were answered on information and belief by counsel for the Petitioner on May 17, 1976. Petitioner's objection to the request for production was founded upon Fifth Amendment privilege.

The answers to the complaint filed on May 17, 1976 denied every material allegation contained in the amended complaint (P.B. 26-33).

Subsequently, Petitioner Doe's Motion for Summary Judgment was granted by the District Court on July 20, 1976, declaring that the contested laws were not unconstitutional yet enjoining the Respondents from enforcing those laws against the Petitioner Doe and the purported class (P.B. 34-45). The District Court refused to stay its decision pending appeal.

The Respondents filed a joint appeal on July 21, 1976 and a Motion for a Stay Pending Appeal on July 27, 1976. Opposition Points and Authorities were filed on July 30, 1976 and the motion was argued on August 3, 1976. On September 30, 1976, the Supreme Court of the State of Nevada reversed the decision of the District Court and remanded with direction to dismiss.

On December 28, 1976, the Petitioner served the Respondents herein by mailing a copy of his Petition for

a Writ of Certiorari and Respondents received said Petition on the 30th day of December, 1976. This proceeding has ensued (P.B. 46).

ARGUMENT

These Respondents respectfully submit that the United States Supreme Court is without jurisdiction to consider this petition on behalf of JOHN DOE and the purported class and should deny the same for the following reasons:

I

The Judgment of the Nevada Supreme Court Rests Upon Adequate Non-Federal Grounds

The decision of the Nevada Court in the instant case is both short and clear. Respondents see no ambiguity in the holding of this opinion.

> "The immediate matter before us for attention is the motion of the appellants for a stay of the district court judgment pending appeal. Since we believe it to be clear that the district court was in error in entering judgment for plaintiffs, we choose to dispose of this litigation rather than to rule upon the interim motion for a stay order. Accordingly, we dismiss this appeal and remand the matter back to the district court with direction to dismiss the action below. *It is not the court's business to render advisory opinions. . .*" (Emphasis added). *Lamb* v. *Doe*, 92 Adv. Op. 163, 554 P.2d 732, 733 (1976).

This Court's attention is directed to the Constitution of the State of Nevada, Art. 6, §§4 and 6 (App. A2-A3) and to the decision of the Supreme Court of Nevada in

City of North Las Vegas v. *Cluff*, 85 Nev. 200, 442 P.2d 461 (1969) wherein the Supreme Court of Nevada stated:

> "We do not have constitutional permission to render advisory opinions." At 201.

The Supreme Court of Nevada held that it was without jurisdiction to entertain Petitioner's action and that the trial court similarly lacked jurisdiction to render advisory opinions. Lack of jurisdiction has been held to be an adequate state ground. *Herb* v. *Pitcairn*, 324 U.S. 117 (1945); *Copperweld Steel Co.* v. *Industrial Commission*, 324 U.S. 780 (1945).

The rule that this court will decline to review state court judgments which rest on independent and adequate state grounds is also necessary to avoid advisory opinions, since the jurisdiction of the Supreme Court of the United States is similarly limited. *Henry* v. *State of Mississippi*, 379 U.S. 443 (1965). Advisory opinions are not cases or controversies under Art. III, §2 of the United States Constitution (App. A1).

The implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions. The rule implements the separation of powers and also recognizes that such suits often are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests. *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961).

The Nevada Supreme Court grounded its decision upon a review of its own jurisdiction. It did not reach the

purported federal question but even if it had, clearly its decision could have been quite properly based on a number of non-federal grounds. This Court should therefore decline review. *Williams* v. *Oliver*, 53 U.S. 111 (1851); *De Saussure* v. *Gaillard*, 127 U.S. 216 (1888); *Stembridge* v. *State of Georgia*, 343 U.S. 541 (1952).

II

Petitioner Doe Failed to Meet Prerequisites for Declaratory Relief

In cases of actual controversies involving actual, immediate disputes as opposed to abstract, hypothetical or academic questions, a judicial determination of rights and liabilities may be declared under the Uniform Declaratory Judgment Act, NRS Chapter 30. John Doe proceeded under this chapter but failed to meet the prerequisites for declaratory relief in Nevada.

As to the question of the Nevada Court's jurisdiction to proceed with declaratory relief in the present matter, *Kress* v. *Corey*, 65 Nev. 1, 26, 189 P.2d 352 (1948), sets forth the conditions precedent to an action for declaratory relief in the State of Nevada.

> "The requisite precedent facts or conditions which the courts generally hold must exist in order that declaratory relief may be obtained may be summarized as follows:
>
> (1) *there must exist a justiciable controversy*; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the *controversy must be between persons whose interests are adverse*; (3) *the party seeking declaratory relief must have a* legal interest in the

controversy, that is to say, *a legally protectible interest;* and (4) the issue involved in *the controversy must be ripe* for judicial determination." (Emphasis added).

There was no justiciable controversy between the Petitioner and Respondents. The Petitioner alleges in paragraph III of the Amended Complaint (P.B. 17) that Respondents were enforcing or threatening to enforce the statutes and ordinances complained of against the Petitioner. If Respondents were presently enforcing the statutes in question against Petitioner then his remedy was at law in the criminal prosecution. Petitioner, however, merely feared prosecution. The case then was not ripe for judicial review.

This Court has held that even where plaintiffs alleged that the District Attorney intended to enforce the statute complained of, and where plaintiffs' intended conduct would be in violation, that a justiciable controversy required a threat of *imminent enforcement,* and therefore the controversy was not ripe for decision and this court lacked jurisdiction to proceed. *Poe* v. *Ullman,* 367 U.S. 497 (1961); *Laird* v. *Tatum,* 408 U.S. 1 (1972).

This Court has also held that the conflict between freedom of the individual and the requirements of the public order should not be adjudicated, "except when definite rights appear upon the one side and definite prejudicial interferences on the other" indicating that the complaint was insufficient with respect to the specificity of both plaintiffs' proposed conduct and the state's threat of enforcement. *United Public Workers of America* v. *Mitchell,* 330 U.S. 75 (1947); also discussed in *Threat of Enforcement—Prerequisite of a Justiciable Controversy,* 62 Columbia Law Review, 106, at 121.

This is aside from the issue that Petitioner herein had no standing to bring an action for declaratory relief under a pseudonym. In an action for declaratory judgment the Plaintiff must have a legally protectible interest in the controversy, *Wells* v. *Bank of Nevada,* 90 Nev. 172, 522 P.2d 1014 (1974). Although Doe plaintiff actions are of first impression in Nevada the Federal courts have refused to allow "John Doe" plaintiffs such standing except under limited circumstances which the Petitioner failed to satisfy.

III

An Action May Not Be Brought or Protected in the Name of a Fictitious Person Unless Certain Conditions Are Met

Under NRCP 10(a), which is identical to FRCP 10(a), a party's name is required to be included in the complaint, to fail to do so is a fatal defect.

The Court's attention is invited to the case of *Roe* v. *New York,* 49 F.R.D. 279 (S.D. N.Y. 1970) based upon FRCP 10(a) where the Court stated:

". . . The Court must be able to identify from the complaint *at least one plaintiff by name*; otherwise, no action has been commenced.

"[2] If an action had been commenced by the filing of this complaint, then amendments could be permitted or protective orders made, on a proper showing, which would shield the identity of plaintiffs from the public while permitting this necessary knowledge *to the Court and to defendants.*" (Emphasis added). *Roe* at 281.

Even in those few jurisdictions where plaintiffs have been allowed to bring an action under a pseudonym, fair-

ness has required that the true identity of the plaintiff be revealed to the Court and defendant.

> "To obviate any possibility that the parties and the issues raised are fictitious and that the jurisdiction of the court is being invoked to decide *moot* questions, ... The privilege of using fictitious names in actions should be granted only in the rare case where the nature of the issue litigated and the interest of the parties demand it and no harm can be done to the public." *Roe, supra,* at 282, citing *Buxton* v. *Ullman,* 147 Conn. 48, 156 A.2d 508, 514 (1959).

The *Roe* Court went on to hold that:

> ". . . Sound public policy would appear to require that a complaint identify by true names at least one plaintiff if the filing is to commence an action; if the complaint fails to identify by true name at least one plaintiff then its filing is not effective to commence an action." *Roe,* at 282.

The rationale for precluding "John Doe" plaintiffs from bringing an action is to assure finality to the action and that res judicata will attach. Exceptions to the rule have involved plaintiffs representing a readily identifiable class, which was clearly defined or where there was at least one known, named plaintiff before the court. These exceptions, however, are in themselves unique. They deal exclusively with highly personal status situations where the right to privacy of the parties demanded its use and where the courts were not required to make crucial factual determinations to reach a decision. Social stigma was central to those cases and their operative facts did not allow for the factual variations present in the instant matter. Additionally, the use of the pseudonym was not made

an issue in those cases. See for example, *Jane Doe* v. *Henry Wade,* 410 U.S. 113 (1973).

The District Court's failure to require Petitioner John Doe to reveal his identity during the course of the proceedings below to either the court or Respondents and its subsequent decision in Petitioner's favor were clearly in error. Not only did the use of a pseudonym deprive the court and Respondents of necessary information but, because of the particular nature of the case, it constituted a fatal defect in the complaint. Therefore, the District Court lacked jurisdiction to proceed on the merits of the case and the Supreme Court of Nevada properly reversed and remanded with direction to dismiss.

IV

Petitioner Doe Failed to Meet the Requirements of NRCP Rule 23(a) for Class Certification

Rule 23(a) of the Nevada Rules of Civil Procedure sets forth the prerequisites of a class action.

Nothing in either of Petitioner Doe's complaints or the record suggests that these prerequisites were satisfied.

The requirement of a numerous class is intended to protect members of a small class from being deprived of their rights without a day in court. *Matthies* v. *Seymour Mfg. Co.,* 270 F.2d 365, *Cert. Denied,* 361 U.S. 962 (1960).

The requirement that a class must be clearly ascertainable with a well-defined community of interest in questions of law and fact is essential to sustain a class action. *Gerhard* v. *Stephens,* 442 P.2d 692, 68 Cal.2d 864 (1968); *City of San Jose* v. *Superior Court of Santa Clara County,* 525 P.2d 701, 115 Cal. Rptr. 797 (1974).

Before a class action can be maintained under NRCP 23(b), it must be shown that questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Hirschi* v. *B. and E. Securities,* 41 F.R.D. 64 (D.C. Utah 1966). *Class Actions* (C.A. Wright), 47 F.R.D. 169, 178; 2 *Barron and Holtzoff, Federal Practice and Procedures* (Wright and Elliott Supplement), Section 562.

The facts in the Amended Complaint are sketchy at best:

> "That Plaintiff JOHN DOE is and intends to immediately engage in *substantial* private wagering, to-wit:
>
> "1. Upon *existing pre-arranged* terms and *conditions* between *close personal* friends of the Plaintiff, which are arrived at and arranged within the State of Nevada, Plaintiff and said close personal friends *intend to routinely and frequently* bet or wager on various non-Nevada sporting events in their private homes or dwellings." (Emphasis added). (P.B. 17).

How much is substantial? What are the terms and conditions of the game? Who qualifies as a close personal friend? How often is routine and frequent? The question really is when does gaming become a business and require licensing. The operative facts are crucial to this case and are peculiar to each individual case. The Respondents attempted to resolve these relevant questions but were denied essential discovery.

The Nevada Supreme Court has held that where an examination of the facts pertaining to each member of the class was necessary, leading to the possibility of a

multiplicity of lawsuits, a class action cannot be sustained. *Johnson, et al.* v. *Travelers Insurance Co., et al.,* 89 Nev. 467, 515 P.2d 68.

There has been no showing on the part of Petitioner Doe that his claims were typical of the individual members of the alleged class. Indeed such a showing would be difficult, at best, where the very nature of gaming activity has inherent in it so many variables, infinite extensions, and chameleon-like inconsistencies, and especially where the facts of Petitioner's proposed conduct are in itself, vague, broad and indefinite.

Petitioner made no showing that he was in a position to "protect fairly and adequately" the interests of the members of the alleged class as required by NRCP 23(a).

In the instant case, it is difficult to conceive how the applicability of a penal statute to a group of individuals can be ascertained in a class action where there is no clear definition of fact as to conduct or proposed conduct, no common fund or transaction, nor agreed to community of interest, where the class was not noticed and defined by the trial court.

Beyond the issue of the sufficiency of the John Doe pleading these Respondents were denied relevant discovery of the operative facts of this action.

V

Fifth Amendment Is a Shield and Not a Sword Protecting People Not Aliases

In order to maintain anonymity under this pseudonym, John Doe asserted the right to invoke a Fifth Amendment privilege in the course of civil discovery and the District Court issued a protective order to that effect. In *Indepen-*

dent Productions Corporation v. *Loew's Inc.*, 22 F.R.D. 266 (S.D. N.Y. 1958) a Plaintiff asserted Fifth Amendment privileges in a private treble damage antitrust action. The Court held:

> "*Plain justice dictates* the view that, regardless of plaintiff's intention, *plaintiffs* must be deemed to have waived their assumed privilege by bringing this action . . . they *can not use this asserted privilege as both a sword and a shield . . . .*" *Id.* at 276, 277. (Emphasis supplied).

The sword and shield metaphor was further developed in an opinion by Chief Justice Desmond and six other Justices of the New York Court of Appeals. The refinement was:

> "*The privilege against self-incrimination was intended to be used solely as a shield, and thus a plaintiff cannot use it as a sword to harass a defendant and to effectively thwart* any attempt by defendant at a *pretrial discovery* proceeding to obtain information relevant to the cause of action alleged, and possible defense thereto." *Laverne* v. *Incorp. Village of Laurel Hollow*, 18 N.Y.2d 635, 272 N.Y.S.2d 780, 219 N.E.2d 294 (1966). (Emphasis added).

A similar issue was addressed in *Lyons* v. *Johnson*, 415 F.2d 540 (9th Cir. 1969), *Cert. Denied*, 397 U.S. 1027 (1970). See also *Brown* v. *Ames*, 346 F. Supp. 1176 (1972); *Foss* v. *Gerstein*, 38 F.R.D. 627 (1973); *Bramble* v. *Kleindienst*, 357 F. Supp. 1028 (1973) and *Penn Communications Specialties, Inc.* v. *Hess*, 65 F.R.D. 410 (1975).

The Court's attention is also invited to the case of *Doe* v. *Boyle*, 60 F.R.D. 507 (E.D. Va. 1973), *Aff'd* 494 F.2d 1279 (4th Cir. 1974), wherein the Plaintiff was seeking

similar relief sought in the instant matter. In dismissing the Plaintiff's complaint, the court said:

> "The Fifth Amendment protects people not aliases. The standard for application of the Fifth Amendment privilege is whether 'the claimant is confronted by substantial and "real," and not merely trifling or imaginary, hazards of incrimination.' *Marchetti* v. *United States*, 390 U.S. 39, 53, 88 S.Ct. 697, 705, 19 L.Ed. 2d 889 (1968). *While the Court accepts the representation of plaintiff's counsel that plaintiff is indeed confronted by a real hazard of incrimination, said representation could not alone, in view of the personal nature of the Fifth Amendment right carry plaintiff's burden of proof on this issue.* Should the Court proceed in this matter in its present posture, and should plaintiff prevail, numerous persons could appear after judgment claiming to be John Doe. That prospect offends the sacred nature of the Amendment guaranty of personal liberty.
>
> "As Justice Holmes said in a similar context in *United States* v. *Sullivan*, 274 U.S. 259, 264, 47 S.Ct. 607, 608, 71 L.Ed. 1037 (1927), the plaintiff 'could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law.' " At 507-508. (Emphasis added).

The result of the District Court's Protective Order was that only the attorneys for Petitioner Doe knew the identity of the Petitioner Only they were privy to facts of the gaming operation at issue other than those disclosed in the complaint and in the answers to interrogatories which were signed and answered by counsel for the Petitioner upon information and belief. Nothing in this record could bind him or the class he purported to represent

to judgment. Similarly, nothing would prevent any number of actions from being brought to establish rights by declaratory judgment as they apply to any hypothetical situation under any criminal statute or ordinance through the use of a fictitious plaintiff.

CONCLUSION

Therefore, Respondents respectfully request that for the foregoing reasons Petitioner's application for a writ of certiorari should be denied for a lack of jurisdiction.

Respectfully submitted,

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APPENDIX

U. S. CONSTITUTION

ARTICLE III

Section 2. Extent of judicial power; criminal trials; venue. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

NEVADA CONSTITUTION

ARTICLE 6

Section 4. Jurisdiction of supreme court; appointment of district judge to sit for disqualified justice. The supreme court shall have appellate jurisdiction in all cases in equity; also in all cases at law in which is involved the title, or the right of possession to, or the possession of, real estate or mining claims, or the legality of any tax, impost, assessment, toll or municipal fine, or in which the demand (exclusive of interest) or the value of the property in controversy, exceeds three hundred dollars; also in all other civil cases not included in the general subdivisions of law and equity, and also on questions of law alone in all criminal cases in which the offense charged is within the original jurisdiction of the district courts. The court shall also have power to issue writs of *mandamus*, *certiorari*, prohibition, *quo warranto*, and *habeas corpus* and also all writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have power to issue writs of *habeas corpus* to any part of the state, upon petition by, or on behalf of, any person held in actual custody, and may make such writs returnable, before himself or the supreme court, or before any district court in the state or before any judge of said courts.

In case of the disability or disqualification, for any cause, of the chief justice or either of the associate justices of the supreme court, or any two of them, the governor is authorized and empowered to designate any district judge or judges to sit in the place or places of such disqualified or disabled justice or justices, and said judge or judges so designated shall receive their actual expense of travel and otherwise while sitting in said supreme court.

* * *

Sec: 6. Jurisdiction of district courts. The District Courts in the several Judicial Districts of this State shall have original jurisdiction in all cases in equity; also in all cases at law which involve the title or the right of possession to, or the possession of real property, or Mining claims, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand (exclusive of interest) or the value of the property in controversy, exceeds Three Hundred Dollars, also in all cases relating to the estates of deceased persons, and the persons and estates of Minors and insane persons, and of the action of forcible entry and unlawful detainer; and also in all criminal cases not otherwise provided for by law; They shall also have final appellate jurisdiction in cases arising in Justices Courts, and such other inferior tribunals as may be established by law. The District Courts, and the Judges thereof shall have power to issue writs of Mandamus, Injunction, Quo-Warranto, Certiorari, and all other writs proper and necessary to the complete exercise of their jurisdiction; and also shall have power to issue writs of Habeas Corpus on petition by, or on behalf of any person held in actual custody in their respective districts.

NEVADA RULES OF CIVIL PROCEDURE

RULE 10. FORM OF PLEADING

(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court and county, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of

other parties. A party whose name is not known may be designated by any name, and when his true name is discovered, the pleading may be amended accordingly.

RULE 23. CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[As amended; effective September 27, 1971.]

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby

making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

[As amended; effective September 27, 1971.]